Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1159

ANDREW J. LOCOCO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Andrew J. Lococo petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 28, 1971.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 450 F.2d 1196 (1971). The final judgment of the Court of Appeals is not yet reported. It is attached hereto as Appendix C.

JURISDICTION.

The decision of the Court of Appeals for the Ninth Circuit remanding this case temporarily to the District Court was filed on September 27, 1971. It is attached hereto as Appendix A. The Findings of Fact and Conclusions of Law of the District Court were filed on December 6, 1971, and are attached hereto as Appendix B. The judgment of the Court of Appeals, based upon the Findings of Fact and Conclusions of Law of the trial court, was filed on December 28, 1971. It is attached hereto as Appendix C. The Motion for Rehearing was denied on February 9, 1972. The Order denying the rehearing is attached hereto as Appendix D. This court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can alleged false testimony, which is totally unrelated to a Grand Jury's stated purpose of investigation, sustain an investigation for perjury?

2. Was it error and a denial of due process for the prosecutor to cross-examine character witnesses on unfounded rumors?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

Title 18, U.S.C. § 1621:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the

statement or subscription is made within or without the United States."

STATEMENT OF THE CASE

The petitioner, Andrew J. Lococo, was indicted on four counts of perjury. The perjury was alleged to have been committed by Lococo on June 26, 1969, before a Grand Jury then sitting in Los Angeles (R 1-7).[1] The trial was to the Court. At the conclusion of the Government's case, the Court granted motions for judgment of acquittal as to Counts I and IV (T. 492, 502), and denied similar motions on Counts II and III. At the conclusion of the trial, the Court acquitted on Count II, but convicted on Count III (T. 917, R. 273). Count III involved the question of whether, given all the facts and circumstances, Lococo was guilty of willful perjury in stating, at one point in his testimony, that he had had no phone conversations with one Ray Mirr during the one-year period preceding his Grand Jury appearance. Lococo was sentenced to five years' imprisonment, fined $2000.00 and subjected to costs of prosecution, with the sentence of imprisonment to be suspended after six months upon certain conditions (R. 273).

The Grand Jury's purpose in calling the petitioner as a witness was to investigate a "series of fixed horse races that were run in the State of California during the past year" (T. 82). The only information that linked Lococo to the Grand Jury investigation were statements by Leland Duane Hart and James Hewitt, who were being investigated for bookmaking in connection with the races. They had testified that they had heard from Harry Walker and Bill Lawler that the petitioner "laid off" big bets (E. 103, Page 129; E. 104, Page 37).[2] The forelady of the Grand Jury

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[1] "R" references are to the Record. "T" references are to the Transcript of Evidence. "E" references are to the Exhibits introduced into evidence.

[2] At the trial, Lawler and Walker testified that in fact they did not know Lococo and that the testimony of Hewitt and Hart before the Grand Jury was false (T. 504, 511).

testified at the trial that this was the only reference to Andy Lococo in the entire Grand Jury proceedings (T. 12-13).

Consistent with the Grand Jury's investigation of Hewitt and Hart, the petitioner was summoned by the Grand Jury and told that their reason for calling him was to ask questions in connection with fixed horse racing in California (E. 1, Page 5). A long series of questions were asked in connection with particular races, and the petitioner gave forthright answers to each question (E. 1, Page 5-14). He was asked if he knew Bill Lawler or Harry Walker and he replied that he did not, nor was he able to identify their pictures (E. 1, Page 5). He denied betting on any of the races in question (E. 1, Page 5, 1.7, 1.8) and stated that he had never accepted any wagers on horse racing (E. 1, Page 8).

After pursuing at length and detail all of the information that in any way connected Lococo with fixed horse racing in California, the Grand Jury then, in a peripatetic fashion, embarked on a line of inquiry that was entirely unrelated to the stated scope of their investigation. Petitioner was asked about no less than fifty people, most of whom he did not know. Included in this list were such illusive names as "The Phantom," "Bankroll Bill," and "Milwaukee Phil." It was in the course of this rambling and unrelated discourse that the petitioner stated he could not remember and did not believe he had spoken to Mirr by telephone during the past year (E. 1, Page 22-23).

There is not one iota of evidence in the record indicating that the telephone calls to Mirr had any relationship to the Grand Jury's investigation. There is no evidence indicating that the calls made from the petitioner's hotel, The Cockatoo Inn, had any connection whatsoever with fixed horse racing in California, nor is there evidence indicating that calls made from The Cockatoo Inn during the horse racing season were in fact made by the petitioner. Nick Lococo, the petitioner's brother, testified that he had made most of the calls from The Cockatoo to Mirr (T. 395), and Mirr was unable to pinpoint the exact times that the

petitioner called him (T. 213), but did testify that the calls did not relate to fixed horse racing or wagering activities (T. 337, 338). The petitioner testified that his five admitted and established calls to Mirr (T. 572) related to reservations for Mirr's relatives at the hotel, conversation about football games and a conversation about a loan to Mirr from Nick Lococo (T. 575, 616, 627-630).

During the trial, the defense called several outstanding character witnesses who knew of the petitioner and of his reputation and of his activities in his community for a period of years. These witnesses were: United States Congressman Charles H. Wilson; Robert C. Yeary, the Senior Vice President of the Imperial Bank; Frank H. Afton, Founder and Vice Chairman of the Sentinela Bank and Director of Southwest Savings & Loan; Ira Kaufman, President of Boston Stores, President of Sentinela Valley Community Hospital, and Trustee of Loyola-Marymount College and of Reiss-Davis Child Study Center; Victor Zaccaglin, President of Cal-Prop Corporation, a real estate investment company; and Melanie Magorell, a lawyer with a long-time professional and a personal association with the petitioner. Each of these witnesses confirmed that the petitioner had an outstanding reputation in the community and was, in every respect, an outstanding citizen. The petitioner, in 1964, was, in fact, designated as the outstanding citizen of his city by the Mayor.

For each and every one of these witnesses, the Government took one approach: they cross-examined entirely by such questions as:

"Q. Have you ever heard that Mr. Lococo was engaged in bookmaking activity?;

Q. Have you ever heard that he was known to place substantial wagers through bookmakers?;

Q. Have you ever heard that Lococo caused the burning of his restaurant in 1958 in order to collect the insurance?;

Q. Have you heard that Lococo was a close associate of a number of racketeers in Milwaukee?;

Q. Do you know anything about any of Mr. Lococo's Milwaukee associates?"

(See, e.g., T. 548, 589, 593, 600, 605, 611).

No effort was ever made by the Government to call any witnesses to rebut the clear and positive testimony of the character witnesses and no effort was made on rebuttal or otherwise to follow up the innuendo contained in any of the questions asked on cross-examination of any of the witnesses.

REASONS FOR GRANTING WRIT

I. *THE PETITIONER'S FAILURE TO REVEAL TO THE GRAND JURY THAT HE HAD MADE LONG-DISTANCE TELEPHONE CALLS TO RAY MIRR WAS IMMATERIAL, SINCE THE CALLS WERE ENTIRELY UNRELATED TO THE THRUST OF THE GRAND JURY'S INQUIRY INTO FIXED HORSE RACING IN CALIFORNIA AND DID NOT HAVE A NATURAL TENDENCY TO INFLUENCE THE GRAND JURY IN ITS INVESTIGATION.*

The petitioner recognizes that under existing authority, false testimony before a Grand Jury is material if it "has a natural tendency to influence the Grand Jury in its investigation." *United States V. Dippolito*, 433 F.2d 1049, 1050 (9th Cir. 1970), *cert. denied*, 401 U.S. 940, 91 S.Ct. 939, 28 L.Ed.2d 220 (1971), and the Government need not prove that the perjured testimony actually impeded the investigation. *Vitello v. United States*, 425 F.2d 416, 424 (9th Cir. 1970), *cert. denied*, 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed.2d 50 (1970). Also, false testimony that tends to influence the Grand Jury need not be directed to the primary subject of the investigation; it is material if it is relevant to any subsidiary issue under consideration by the tribunal. *Barnes v. United States*, 378 F.2d 646, 649 (5th Cir. 1967), *cert. denied*, 390 U.S. 972, 88 S.Ct. 1056, 19 L.Ed.2d 1184 (1969).

As a consequence of the Court of Appeals Opinion, the element of materiality has been totally deleted from the crime of perjury.

Any statement made by any witness "has a natural tendency to influence the Grand Jury in its investigation."

The consequences of such a ruling creates a Grand Jury proceeding whereby anyone can be ensnared in a perjury charge, if the Grand Jury chooses to go on a fishing expedition into matters that have no relation to their stated purpose. The result is that a Grand Jury loses its independence as a fact finding body and becomes nothing more than an inquisition. There are no standards limiting the scope of their investigation.

Here the Court of Appeals has, in effect, reasoned that since the Grand Jury was investigating fixed horse racing it was also investigating the more general area of gambling, thus a telephone call to Ray Mirr, a purported bookmaker, is material. Such an analysis creates a standard so vague that a witness appearing before a Grand Jury is subject to questioning on any topic without advance notice, and is placed in a position where he cannot adequately exercise his constitutional rights.

II. *THE CROSS-EXAMINATION OF CHARACTER WITNESSES BY THE PROSECUTOR WAS PREJUDICIAL TO THE PETITIONER.*

The United States Attorney severely prejudiced the petitioner when he was permitted to cross-examine character witnesses on unfounded rumors. The petitioner recognizes that when a defendant puts his character into issue by calling character witnesses to vouch for his qualities as a citizen, he runs the risk of having the prosecutor cross-examine on issues of community opinion. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *Carbo v. United States*, 314 F.2d 718, 740 (9th Cir. 1963). However, because this rule "is pregnant with possibilities of destructive justice," McCormick on Evidence, § 158 at Page 336, there are limitations on the scope of the prosecutor's cross-

examination.[3] A prosecutor must act in good faith and void prejudicing the trier of fact by implying that groundless accusations are, in fact, true. *Aukward v. United States*, 352 F.2d 641 (D.C. Cir. 1965). Yet, this was the entire thrust of the Government's approach to the defendant's character evidence.

Evidence of the Government's impropriety was shown by the form of the questions to the character witnesses. The theory of permitting cross-examination on hearsay opinion is to ascertain the "general talk of people about defendant rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed." *Michelson v. United States*, *supra*, at 69 S.Ct. 221.

The prosecutor, after first seeking whether the witnesses had heard that the petitioner was an associate of Milwaukee racketeers, repeatedly asked, "Do you know anything about any of Mr. Lococo's Milwaukee associates?" (See, *e.g.*, T. 548, 589, 593, 600, 605 and 611).

The purpose of this questioning was to taint the defendant in the eyes of the trier of fact with the brush of organized crime, even though there was not one iota of evidence ever offered by the Government showing the defendant's involvement in such activity. Such conduct is potent with potential error, *Filipelli v. United States*, 6 F.2d 121 (9th Cir. 1925); *Shimon v. United*

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[3] The Preliminary Draft of Proposed Rules of Evidence for the United States District Court and Magistrates recognizes that possibilities of abuse are substantial. To eliminate destructive cross-examination, the Advisory Committee's Note to Rule 6-08, Subdivision (c)(2) states:

"Consequently, safeguards are erected in the form of requirements that the instances inquired into be relevant to truthfulness, that the probative value of the evidence not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, or by waste of time, under Rule 4-03, and that the witness be protected against undue harassment or embarrassment under Rule 6-11."

States, 352 F.2d 449, 453 (D.C. Cir. 1965),[4] and is grounds for reversing the Court of Appeals.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

FLYNN KIMERER THINNES & GALBRAITH

By John J. Flynn
Michael D. Kimerer

Counsel for Petitioner

March, 1972

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[4] Chief Justice Berger wrote the *Shimon* opinion during his tenure as a Circuit Court Judge in the District of Columbia. He states:

"*** The danger lurking in this impeachment process is that in order to frame an intelligible question, the examiner's query often gives details of *specific misconduct* affecting general reputation which would not otherwise be admissible. *** The wide discretion vested in a trial judge carries with it a very heavy and difficult responsibility to control the use of both devices — the parade of partisans and their impeachment by reference to other rumored acts and events. He must be alert to prevent questions conveying to the jury by innuendo prejudicial matter in which the Defendant himself is the real target, ***"

APPENDIX A

UNITED STATES of America,
Appellee,
v.
Andrew J. LOCOCO, Appellant.
No. 26336.
United States Court of Appeals,
Ninth Circuit.
Sept. 27, 1971.

John J. Flynn (argued), Michael D. Kimemer, of Flynn, Kimerer, Thinnes and Galbraith, Phoenix, Ariz., for appellant.

Michael Lightfoot, Asst U. S. Att., (argued) Robert L. Meyer, U. S. Atty., Gerald Uelman, Asst. U. S. Atty., Los Angeles, Cal., for appellee.

Before BARNES, KOELSCH, and HUFSTEDLER, Circuit Judges.

HUFSTEDLER, Circuit Judge:

Lococo appeals from his conviction upon one count of perjury based upon his false testimony before a federal grand jury that he had not talked to Ray Mirr during the previous year.[1] Lococo

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[1] Lococo was indicted for giving the following testimony:

"Q. Do you talk to him [Mirr] frequently?
A. No.
Q. When was the last time you talked to him?
A. Gosh, I don't remember. Quite some time ago.
Q. What would be your reason for talking to Mr. Mirr by telephone?
A. Well, I haven't talked to him.
Q. You have not talked to Mr. Mirr?
A. You mean the last time I spoke to him?
Q. Yes.
A. Could have been that — I really don't remember now. I don't even remember when I spoke to Ray last, it's so long.
Q. All right. Would you have spoken to Ray Mirr within the past year?
A. No."

contends that (1) his testimony was not material to the grand jury's investigation, (2) the district court prejudicially erred in admitting, over his objections, the records of about 83 telephone call's to Mirr's home and business telephone charged to Lococo's business telephone, and (3) the evidence was insufficient to sustain the conviction.

Lococo and his wife are the sole stockholders of a corporation that owns and operates the Cockatoo restaurant. They directly own and operate a hotel, the Cockatoo Inn. The Lococos' home is located on property adjoining the hotel and restaurant complex.

In December 1968, a federal grand jury was convened in Los Angeles to investigate interstate wagering, bookmaking, loan sharking, bribery, and sporting contests. On April 11 and June 19, 1969, two grand jury witnesses implicated Lococo in bookmaking. Prior to Lococo's appearance, the grand jury was informed that Mirr had been involved in interstate gambling.

On June 26, 1969, Lococo appeared before the grand jury. He was initially informed that the grand jury was investigating "possible violations of the Federal laws relating to interstate wagering activity, interstate transportation and aid of racketeering, bribery and sporting contests, and possible other Federal offenses." After Lococo recited his name, address, and occupation, the grand jury explained that it was "concerned with a series of fixed horse races that were run in the State of California during the past year." Lococo denied any knowledge of or profit from the races. Lococo was later asked if he knew several different people. He admitted friendship with Ray Mirr whom he had known since his childhood in Milwaukee, but he said that he had not spoken to Mirr within the past year.

After completing his testimony, Lococo examined his restaurant's telephone bills and discovered a large number of calls to Milwaukee where Mirr lived and worked. Lococo tried unsuccessfully to contact his brother Nick Lococo ("Nick"). Nick spent most of his time in and around the Cockatoo. The following day

Lococo flew to Milwaukee where he met Mirr. The substance of their conversations, reiterated by Mirr to the grand jury in July 1969, was that Mirr reminded Lococo that Lococo had called him a few time in 1968 and that Mirr told him that Nick had called him many times. Over Lococo's objection based on an assertion of his Fifth Amendment privilege, the grand jury ordered him to turn over the Cockatoo's telephone and travel records.

[1] In August 1969, Lococo's lawyers discussed his testimony with the United States Attorney who offered to let Lococo reappear before the grand jury, but who also admonished Lococo's counsel that correction of any errors in the testimony would not benefit Lococo.[2] Counsel then advised Lococo not to reappear. Lococo's indictment for perjury followed.

[2] Lococo's conviction cannot be sustained unless his false testimony was material to the grand jury's investigation. (18 U.S.C. § 1621; United States v. Edmondson (5th Cir. 1969) 410 F.2d 670, 672-673, cert. denied 396 U.S. 966, 90 S.Ct. 444, 24 L.Ed.2d 430; United States v. McFarland (2d Cir. 1966) 371 F.2d 701, 703, cert. denied (1967) 387 U.S. 906, 87 S.Ct. 1689, 18 L.Ed.2d 624.) He contends that the grand jury was investigating fixed horse races in California and related wagering and that his testimony was immaterial to that investigation because the Government did not offer evidence connecting his calls to that subject matter.

[3-6] Lococo's emphasis on the Government's failure to show a nexus between his calls to Mirr and the California races is misplaced. The Government was not obliged to prove the connection in order to establish materiality. (*See* United States v. Dippolito (9th Cir. 1970) 433 F.2d 1049, 1050, cert. denied (1971) 401

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[2] If Lococo intentionally lied to the grand jury, his later recantation would not erase the perjury (United States v. Norris (1937) 300 U.S. 564, 57 S.Ct. 432, 81 L.Ed. 859), but willingness to correct a misstatement is relevant to the issue of intent (Beckanstin v. United States (5th Cir. 1956) 232 F.2d 1; United States v. Geller (S.D.N.Y. 1957) 154 F.Supp. 727).

U.S. 940, 91 S.Ct. 959, 28 L.Ed.2d 220 (1971). False testimony before a grand jury is material if it "has a natural tendency to influence the Grand Jury in its investigation" (*id.* at 1050); the Government need not prove that the perjured testimony actually impeded the investigation (Vitello v. United States (9th Cir. 1970) 425 F.2d 416, 424, cert. denied (1970) 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed.2d 50). Moreover, false testimony that tends to influence the grand jury need not be directed to the primary subject of the investigation; it is material if it is relevant to any subsidiary issue under consideration by the tribunal. (Barnes v. United States (5th Cir. 1967) 378 F.2d 646, 649, cert. denied (1969) 390 U.S. 972, 88 S.Ct. 1056, 19 L.Ed.2d 1184; *see* United States v. Stone (2d Cir. 1970) 429 F.2d 138, 140; Blackmon v. United States (5th Cir. 1940) 108 F.2d 572, 573-574.)

[7] Prior to Lococo's appearance the grand jury had been told that Lococo was engaged in bookmaking and that Mirr was a gambler. Had Lococo admitted that he had telephoned Mirr, his testimony, considered with the other information before the grand jury, might have supplied a link between Mirr and an alleged California gambler bearing on the interstate gambling activities that the grand jury was probing. Lococo's false statements curbed the flow of information to the grand jury. We cannot say that his diversion did not tend to influence the investigation. His testimony was material.[3]

[8] We turn to Lococo' claims of error in the admission of evidence. His first contention requires little comment. He argues that the Fifth Amendment privilege should be extended to the records of a corporation when the corporation is wholly owned

[3] Materiality is tested as of the time the investigation is being made. Later proof that a truthful statement would not have helped the grand jury does not render the false testimony immaterial. United States v. Stone (2d Cir. 1970) 429 F.2d 138; United States v. McFarland, *supra*, 371 F.2d at 703-704; United States v. Siegel (2d Cir. 1959) 263 F.2d 530, cert. denied 359 U.S. 1012, 79 S.Ct. 1147, 3 L.Ed.2d 1035.

by the witness asserting the privilege and his wife. We have rejected that argument in Fineberg v. United States (9th Cir. 1968) 393 F.2d 417; Wild v. Brewer (9th Cir. 1964) 329 F.2d 924, cert. denied (1964) 379 U.S. 914, 85 S.Ct. 262, 13 L.Ed.2d 185, to which decisions we adhere.

Next he contends that there was prejudicial error in admitting records of 83 out of the 90 calls listed to Mirr's telephone numbers billed to the Cockatoo's number. Lococo admitted that he made 7 of the 90 calls.[4] He argues that the records of all the calls, except those 7, were inadmissible because the Government failed to lay the necessary foundation for their admission against him.

[9, 10] The records of the calls were inadmissible in absence of proof that Lococo made the calls or caused them to be made. There was no direct proof that Lococo made more than the 7 identified calls. Of course, circumstantial evidence may be used to identify a defendant as the caller. (United States v. Roselli (9th Cir. 1970) 432 F.2d 879, cert. denied (1971) 401 U.S. 924; Carbo v. United States (9th Cir. 1963) 314 F.2d 718, cert. denied, Palermo v. United States, (1964) 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498.) For example, there may be evidence of conduct by a defendant or by others so tied to the telephone calls that a discernible pattern emerges by which the identity of the caller is revealed, as in *Roselli*, or there may be travel records that tend to identify the caller, as is true of two of the admitted calls in this case,[5] or access to the particular phone may be so limited that there is high probability that one person placed the calls. The overwhelming majority of the listed calls were not connected to Lococo by anything other than the telephone numbers

[4] There was evidence that several of the calls were about football games; at least one of them concerned a requested $500 loan to Mirr; two calls were made about hotel accommodations for Mirr's relatives.

[5] Travel records suggested at least a possibility that 3 other calls might be attributed to Lococo.

themselves. Access to the Cockatoo number was not limited to Lococo. Indeed, the uncontradicted evidence was that Nick had the use of that telephone and that Nick called Mirr at least once a week and sometimes daily. There was no evidence that Nick was acting under Lococo's direction in placing those calls.

Was the error in admitting the bulk of the records prejudicial?[5] Under the circumstances of this case, we think that that is an issue the district court should first consider. The critical issue was whether or not Lococo deliberately lied when he told the grand jury that he had not talked to Mirr during the prior year. Had Lococo made 90 calls to Mirr during that time, rather than 7, it is inconceivable that he could have been honestly mistaken in his testimony before the grand jury. The quantity of calls was considered by the district court.[6]

Aside from the volume of calls, the circumstantial evidence upon the intent issue was delicately balanced. Lococo points to evidence that he made many long-distance calls every day in the course of his business, to support an inference that he forgot about the few admitted calls. He also refers to his abortive efforts to correct his testimony, to the somewhat confusing line of interrogation that preceded his false statements, and to the testimony of several prominent character witnesses who testified on his behalf. The Government draws contrary inferences from Lococo's other conduct. We think the district court should determine whether it finds the admission of the records of a large number of "unidentified" phone calls was or was not a crucial element in his weighing

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[6] The case was tried by the court without a jury. While considering the evidence, the court observed:

"The defendant is guilty, it would seem to me, without looking at all the other calls made although if they tend to prove anything, and I am not saying how strongly they do, they do tend to show that numerous, numerous, numerous calls were made from Mr. Lococo's number. That not all of those, as the witness Mirr has said, even as the defendant himself will admit, came from Nick. And there wouldn't have been anybody else we know of that could have or would have called Mr. Mirr."

the evidence against Lococo. In other words, was there *other* evidence sufficient to convict, beyond a reasonable doubt?

The cause is remanded temporarily to the district court judge to permit him to place his findings and conclusions in writing, certify them to this court, and return the record, so augmented, to this court. On this remand the entire record shall be returned to the trial court. Upon the receipt of the clerk of this court of the entire augmented record, the appeal will again be forthwith submitted to this same panel, without further argument, unless later ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANDREW J. LOCOCO, Defendant.	No. 1877-AH-CD FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on April 7, 1970, before the Honorable A. Andrew Hauk, United States District Judge on the basis of an indictment charging the defendant Andrew J. Lococo with four counts of perjury in violation of Title 18, United States Code, Section 1621. Prior to the commencement of the proceedings the defendant waived both trial by jury and special findings of fact. At the close of the Government's case in chief, the Court granted motions for judgment of acquittal as to Counts I and IV (RT 492, 502).* At the conclusion of the trial, the court acquitted the defendant on Count II and convicted him on Count III. (RT 917)

On appeal from the conviction, the Ninth Circuit remanded the case to the District Court for the entry of written findings and conclusions designed to clarify whether evidence concerning a number of the telephone calls, held by the Court of Appeals to have been erroneously admitted during the trial, "was or was not a crucial element in . . . weighing the evidence against Lococo." U.S.A. v. Lococo, No .26336 (9th Cir. Sept. 27, 1971). Accordingly, having examined the opinion of the Court of Appeals, the Court hereby makes the following findings and conclusions on that issue:

*"RT" followed by numbers refers to page numbers in the Reporter's Transcript.

1. In December, 1968, a federal grand jury was convened in Los Angeles, California to investigate interstate wagering, bookmaking, loan sharking, bribery and sporting contests.

2. On June 26, 1969, the defendant Lococo appeared before the grand jury. At the outset of the proceeding he was advised that the grand jury was inquiring "into possible violations of the federal laws relating to interstate wagering activity, interstate transportation . . . [in] aid of racketeering, bribery and sporting contests, and possible other federal offenses." (RT 80)

3. Defendant Lococo was first questioned concerning betting activities and certain specific horse races which had been run in the previous year. He disclaimed virtually all knowledge of relevant information concerning the races. (RT 82-86, Lococo)

4. He was then questioned concerning his own possible activities in connection with wagering on sporting events in general. At that time he fully understood that the questioning related to sporting events of all kinds and was not limited to horse racing. (RT 86-87, Lococo)

5. Defendant Lococo was then asked whether he knew certain named individuals, some of whom he knew and some of whom he did not know. With respect to those he did know, Lococo was questioned generally concerning wagering activity which he may have engaged in with them. These questions were not limited solely to matters concerning California horse races. (Gov't. Ex. 1, pp. 10ff.) Among those about whom Lococo was asked was Ray Mirr, a resident of Lococo's home town, Milwaukee, Wisconsin. Lococo stated he had known Mirr for some twenty-seven years. (RT 88-89, Lococo) There then ensued the following colloquoy:

"Q Have you seen him at all in the last 25 years?

A Yes.

Q How frequently?

A I haven't seen him for some time now. The last time when [sic] he took a trip out here, ten, eleven years ago. I guess he was out for one of the Rose Bowl games when Wis-

consin was playing in the Rose Bowl. This is some time ago.

Q And you have not seen him since then?

A No.

Q Do you talk to him frequently?

A No.

Q When was the last time you talked to him?

A Gosh, I don't remember. Quite some time ago.

Q What would be your reason for talking to Mr. Mirr by telephone?

A Well, I haven't talked to him.

Q You have not talked to Mr. Mirr?

A You mean the last time I spoke to him?

Q Yes.

A Could have been that — I really don't remember now. I don't even remember when I spoke to Ray last, it's so long.

Q All right, would you have spoken to Ray Mirr within the past year?

A No."

(RT p. 89, L. 13 to p. 91, L. 4.)

It was this testimony which was later alleged to be perjurious. Lococo then went on to claim that he had never exchanged any money or borrowed any money from, Mirr for any reason, although he loaned him a few hundred dollars some eight years before. That, he said, was the last time he had seen Mirr. (RT 91-92, Lococo)

The following dialogue then took place:

"Q And it is your testimony that you have not had any occasion to speak to Ray Mirr by telephone or otherwise within the past year?

A Not that I can remember, no, I haven't spoke to him.

Q If you had talked to him by telephone, what reason would you have to call him?

A Outside of just saying hello to him, you know.

Q Just to renew —

A Right.

Q — an old friendship?

A Yes."

(RT 93, L. 7-19)

6. Lococo is the proprietor of the Cockatoo Hotel and a large adjoining restaurant in Hawthorne, California. (RT 554, Lococo) He manages the business from an office at the Cockatoo and in so doing he uses the telephone in the Cockatoo restaurant. He conducts a large portion of his business on the telephone and has occasion to make numerous long distance telephone calls in that connection. (RT 556-559, 565-567, Lococo) Lococo's brother Nick, although not employed at the Cockatoo, does spend time there and has access to the restaurant telephone. (RT 391-394, Nick Lococo)

7. Telephone records introduced at trial indicate that between September, 1968 and January, 1969 there were approximately 80-90 telephone calls billed to the Cockatoo's number and directed to numbers listed to Ray Mirr. (Gov't. Ex. 4.) Direct evidence, supplied by the testimony of Ray Mir and the defendant himself, demonstrates that the defendant made seven of these calls: two in October, 1968, to discuss certain reservations at the Cockatoo (RT 231-232, Mirr; 627-628, Lococo); one each from South San Francisco and Tacoma, Washington (RT 629, Lococo); one call at the time of the Rose Bowl and another at the time of the Super Bowl. (RT 224, Mirr; 629, Lococo) and one call in January concerning a requested $500 loan to Mirr. (RT 241-242, Mirr; 574-575, Lococo) In addition, Lococo admitted that there were possibly ten total telephone calls between himself and Mirr. (RT 572, Lococo) Lococo and Mirr were admittedly enthusiastic football fans and discussed various football games during several

of their conversations. (RT 216, Mirr; 629-630, Lococo) In fact, with respect to certain of the calls, according to Lococo's trial testimony, the only reason for them would have been to discuss football. (RT 630, Lococo) Direct evidence also demonstrated that Nick was responsible for a number of the telephone calls made from the Cockatoo to Mirr during the time in question. (RT 395-397, Nick Lococo)

8. Following his appearance before the Grand Jury on June 26, 1969, Lococo flew to Milwaukee, met with Mirr, and discussed with him the Grand Jury inquiry into the telephone calls between them. (RT 276, Mirr; 364, Lococo) According to Lococo's testimony, it was this discussion with Mirr, together with a post-Grand Jury examination of the Cockatoo's telephone records which awakened Lococo to the fact that he had had telephone conversations with Mirr during the previous year and that his testimony before the Grand Jury had consequently been, as he described it, "mistaken." (RT 571-572, 648, Lococo)

9. Thereafter Mirr appeared before the Grand Jury, pursuant to subpoena, on July 14, 1969 and August 21, 1969. During his appearance of August 21, 1969 he testified concerning telephone conversations between himself and the defendant which took place between September, 1968 and June, 1969. (Gov't. Ex. 101) Lococo met with Mirr in Los Angeles both before and after the latter's initial appearance at the Grand Jury and at those meetings was advised that Mirr thad been ordered to return before the Grand Jury in August. (RT 661-672 Lococo)

10. On August 20, 1969, one day before Mirr was scheduled to return before the Grand Jury, attorneys for Lococo visited the United States Attorney's Office, inquiring whether the defendant could be permitted to appear again before the Grand Jury to correct what was described as some "mistaken" testimony. (RT 524-528, Chargin) The attorneys were advised that the request would be granted but that the second appearance would not preclude a perjury prosecution for the testimony at the first appear-

ance. (RT 535-536, Chargin; 742, 745-746, Streller) For various reasons the defendant shortly thereafter determined not to take advantage of the opportunity for the further appearance. (RT 745-746, Streller)

11. At trial, Lococo attributed his erroneous testimony before the Grand Jury to his nervousness and his belief that the questions asked related only to the "horse racing deal." (RT 572-573, Lococo)

12. To the extent these findings of fact also contain conclusions of law, they shall be deemed incorporated within the conclusions of law.

CONCLUSIONS OF LAW

1. Applying the rules of law, including the rules concerning burden of proof, appropriate to criminal prosecutions in general and perjury cases in particular, the Court finds beyond any reasonable doubt that the defendant was not mistaken but rather intentionally lied in giving the testimony set forth in Count Three of the indictment and further set forth in Finding of Fact No. 5, *supra*, for the following reasons:

A. The proven telephone calls were made under such circumstances as to preclude any reasonable possibility that the fact of their having been made could have been forgotten. Three of the calls dealt with events which, so far as testimony at trial showed, were not normal to a mere "friendship" relationship between Mirr and Lococo: the two October calls concerning reservations at the Cockatoo for some of Mirr's relatives and the one January call concerning the $500 loan. In addition, there were two other telephone calls which were singular and unusual in that they were made from cities other than Los Angeles but charged to the Los Angeles number. *Finally, there were two calls which coincided with and involved discussion of two well-known football games which are played once per year.*

B. Lococo and Mirr were personal friends and were not associates in either of their respective legitimate businesses, but all of the telephone calls (with the possible exception of one) were made from or charged to Lococo's business telephone. It is thus unlikely that the calls simply became lost in Lococo's mind among the admittedly numerous business calls which Lococo made from that telephone during the relevant period.

C. During his appearance before the Court on the witness stand, Lococo did not impress the Court, either in his demeanor or in the substance of his answers, with his candor, reliability or credibility, To cite only two specific examples:

1. His explanation before the Grand Jury of why he would have called Mirr, if he had called him (i.e., to renew an old friendship) is totally and inexplicably inconsistent with both his and Mirr's tesimony at trial that they were rabid football fans and that some of the admitted telephone calls had been made specifically to discuss certain football games. It is perfectly clear that the two were not merely old friends who communicated with each other occasionally and irregularly. Rather, at least during the 1968-1969 football season, they were in touch on a number of occasions on a specific matter of mutual interest, namely, football.

2. Lococo's explanation that the erroneous testimony before the Grand Jury was the result of nervousness and his belief that the questions concerning Mirr related to horse races is simply not crelible nor is it supported by the record of the Grand Jury testimony. The questioning at the beginning of Lococo's testimony *was* limited to certain horse races but then, before there was any mention of Mirr, the question was specifically broadened to cover activities connected with all sporting events. As to those individuals

about whom Lococo was asked prior to being asked about Mirr, and whom he admitted knowing, he was asked both general questions concerning his relationship with them and more specific questions concerning wagering. The questioning was restricted neither to horse racing nor, for that matter, to wagering in general. The same was true of the questions relating specifically to Mr. Mirr which was the subject of the perjury charge. Furthermore, Lococo did not indicate at the time of the specific questioning concerning Mirr nor did he indicate at any other time during his testimony before the Grand Jury that he understood the questions to be so restricted. Nor did Lococo ever indicate that he was uncertain or unsure in answering the questions about Mr. Mirr or that he needed additional time to think about the questions in order to set his mind at ease. There is therefore no support for Lococo's claim of confusion and nervousness. In fact, a thorough reading of the Grand Jury record indicates to the contrary.

D. Lococo's request for an opportunity to correct his testimony does not, under the circumstances, lend support for his position. Even under his view of the facts, he learned of the "mistake" within two days of his Grand Jury appearance, yet he waited almost two months before seeking out the United States Attorney. When he finally did contact the United States Attorney, it was on the day prior to the second appearance of Mirr before the Grand Jury. Mirr was the one person who could contradict Lococo's testimony. Lococo had several meetings with Mirr between June 26 and August 19, and Lococo knew that Mirr was to have a Grand Jury appearance in August. The most reasonable inference is that Lococo, far from being anxious to correct "mistaken" testimony, was fully aware of the perjury he had committed, delayed any action until he became certain that Mirr would be required to testify and then tried to

redeem his difficult position by approaching the United States Attorney's office and describing his testimony as a mistake.

2. The testimony of the character witnesses, given its appropriate weight and considered along with all the other evidence, did not raise a reasonable doubt as to the defendant's guilt in *this* case and was not sufficient to overcome the strong evidence of intentional perjury by Lococo.

3. The large number of "unidentified" telephone calls, held to have been erroneously admitted into evidence, were not a significant factor in weighing the evidence against Lococo. Their insignificance is attested to by the fact that they were unidentified. The Court originally admitted the telephone records subject to the calls listed thereon being tied in to the defendant by other evidence. (RT 53-54) Subsequent evidence demonstrated that at least some of these calls reflected on the telephone records which were admitted into evidence were in fact calls between Lococo and Mirr, although not in every case could it be shown which specific call in the records related to the specific call shown by other evidence. Thus, to that extent, the telephone records corroborate the testimonial evidence. The remainder of the telephone calls were either tied-to Nick Lococo or were not tied specifically to anyone. Thus, although admitted into evidence they were unidentified and therefore lacked any meaningful probative value, and were not considered by the Court in finding the defendant guilty.

As the Court pointed out in the oral remarks at the time of its decision, it found the defendant guilty without even looking at the telephone calls which had not been tied by other evidence to the defendant. (RT 923) The observation which followed that finding and which is found in the same paragraph of the transcript was intended merely to point out that the *defendant* could take no comfort from the existence of the large number of calls either tied to Nick or tied to no one; it was not meant to suggest

that those calls lent any meaningful, much less any crucial or determinative, weight to the Government's case.

4. To the extent these conclusions of law also contain findings of fact, they shall be deemed incorporated within the findings of fact.

DATED: This 6 day of December, 1971.

/s/ A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. ANDREW J. LOCOCO, Appellant.	No. 26336 ORDER

Before: BARNES, KOELSCH, and HUFSTEDLER, Circuit Judges

This court has reviewed the district court's findings and conclusions made upon limited remand of the cause. Upon the basis of those findings, this court concludes that error in the admission of the telephone records was not prejudicial and that the admissible evidence was sufficient to sustain the conviction. The judgment is ordered AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. ANDREW J. LOCOCO, Appellant.	No. 26336 ORDER

Before: BARNES, KOELSCH, and HUFSTEDLER, Circuit Judges

Appellant's petition for rehearing is DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

ANDREW J. LOCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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HENRY E. PETERSEN,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals ordering a limited remand is reported at 450 F.2d 1196 (Pet. App. A). The opinion of the district court on remand and the subsequent order of the court of appeals affirming the conviction (Pet. App. B and C) are not yet reported.

JURISDICTION

The court of appeals remanded this case to the district court on September 27, 1971, to allow it to

make findings and conclusions on an issue not raised in this Court. The judgment of the court of appeals after remand was entered on December 28, 1971. A motion for rehearing was denied on February 9, 1972 (Pet. App. D). The petition for a writ of certiorari was filed on March 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's perjurious testimony was material to the grand jury's investigation of interstate gambling activities.

2. Whether the cross-examination of petitioner's character witnesses was prejudicial.

STATEMENT

After trial before the district judge in the United States District Court for the Central District of California, petitioner was convicted of one count of perjury in violation of 18 U.S.C. 1621. He was sentenced to five years' imprisonment, with the sentence to be suspended after six months, and was fined $2,000.

The evidence showed that in December 1968, a federal grand jury was convened in Los Angeles to investigate, *inter alia*, interstate gambling and bookmaking activities in violation of 18 U.S.C. 1952 (R. 6, 11-12, 80).[1] During the course of that investi-

[1] "R." refers to the trial transcript; "GX" refers to Government Exhibit.

gation, the grand jury heard testimony from two witnesses that petitioner accepted bets too large for other bookmakers (lay-offs) and that he took bets on any sports event and placed bets himself (GX 103, 104; R. 11-12, 17). Among other matters brought to the grand jury's attention prior to petitioner's appearance were the gambling activities of two Milwaukee residents, Ray Mirr and Frank Sansone (R. 9, 16). The grand jury was also aware of 100 telephone calls to Sansone and 85 to Mirr from petitioner's restaurant (The Cockatoo) in the previous six months, during which time three of the races under investigation were run. On September 25, 1968, the day following one of these races, three calls from petitioner's restaurant were made to both Sansone and Mirr (GX 4, 5; R. 45-46).

The grand jury, believing that petitioner might have had information regarding the matters under investigation, subpoenaed him to appear on June 26, 1969 (R. 12). Petitioner appeared and, at the commencement of the proceedings, an Assistant United States Attorney advised him that the grand jury was looking "into possible violations of the Federal laws relating to interstate wagering activity, interstate transportation and aid of racketeering, bribery and sporting contests, and possible other Federal offenses" (R. 80). Preliminary questions dealt with general background information on petitioner's business activities. The grand jury then advised him of its specific concern with a series of fixed horse races that were run in California during the past year

(R. 82). After he had answered questions regarding that matter (R. 82-86), the grand jury broadened the inquiry and asked petitioner about his possible activities in bookmaking and wagering. He admitted having known or heard of certain named individuals, including Ray Mirr, a resident of his home town of Milwaukee, Wisconsin; petitioner stated that he had known Mirr for 27 years (R. 88-89). In response to a further question, petitioner testified that he had not spoken to Mirr on the telephone in the past year (R. 91). This statement, later proven to be false, was the basis of the perjury charge.

At trial, petitioner called several character witnesses to testify to his reputation in the community. On cross-examination, the following questions were asked of each witness (R. 548, 589, 593, 600, 605-606, 611-612):

> Q. [H]ave you ever heard that Mr. Lococo was engaged in bookmaking activity?
>
> Q. Have you ever heard that he was known to place substantial wagers through bookmakers?
>
> Q. Have you ever heard that Mr. Lococo caused the burning of his restaurant in 1958 in order to collect the insurance?
>
> Q. Have you heard that Mr. Lococo was a close associate of a number of racketeers in Milwaukee, Wisconsin?
>
> Q. Do you know anything about any of Mr. Lococo's Milwaukee associates?

ARGUMENT

1. Petitioner contends that his perjurious statement was not material to the grand jury's investigation. When petitioner appeared before the grand jury it had the following information: two witnesses had testified that petitioner had taken bets; two Milwaukee residents, Mirr and Sansone, had gambling backgrounds; telephone records showed numerous calls from petitioner's restaurant to Mirr and Sansone during the period under investigation, with some of these calls placed very near the time of certain races that the grand jury was investigating. The questions the grand jury asked petitioner were aimed at discovering whether the telephone calls to Mirr were related to gambling activities. Since the grand jury was investigating any interstate activities in furtherance of gambling (not just horse racing), these questions were relevant. If petitioner had telephoned Mirr during the past year, this may have supplied a link bearing on the interstate gambling activities being probed.

2. Petitioner also claims that he was prejudiced by the government's cross-examination of his character witnesses. However, petitioner raised no objections to any of these questions at trial, which took place before the district judge without a jury. See *United States* v. *Lookretis*, 422 F.2d 647, 651 (C.A. 7), certiorari denied, 398 U.S. 904; *United States* v. *Gulley*, 404 F.2d 534, 536 (C.A. 7); *United States* v. *Lewis*, 433 F.2d 1146, 1152 (C.A. D.C.). In any event, since petitioner put his reputation in issue

by eliciting testimony from these witnesses regarding his character, the prosecution permissibly engaged in cross-examination on this issue. *Michelson* v. *United States*, 335 U.S. 469. The questions complained of were within the bounds of allowable inquiry. While the last question, which began "Do you know," may not have strictly adhered to proper form, it was not so prejudicial, in a trial to the court, that it constituted plain error.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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